



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 31, 2003

Mr. Monty Waters
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2003-7859

Dear Mr. Waters:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190400.

The Texas Department of Health (the "department") received a request for information relating to the document titled "Health Consultation; Texas Voluntary Cleanup Program No. 538; Trichloroethylene Groundwater Plume, El Campo Wharton County, Texas, June 24, 2002." The requestor specifically seeks all information relating to the "area of groundwater contamination" including, but not limited to, the data supporting your designation of this area as "the area of groundwater contamination" and any additional work, reports or data relating to the activities the department has undertaken. You note that you will release some of the requested information to the requestor. You claim that the remainder of requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed not later than the tenth business day after the date of receiving the written request for information. *See Gov't Code* § 552.301(b). In addition, section 552.301(e) provides that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written

request, submit to the attorney general: (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld; (2) a copy of the written request for information; (3) a signed statement as to the date on which the written request for information was received by the governmental body or evidence sufficient to establish that date; and (4) a copy of the specific information requested or representative samples of it, if a voluminous amount of the information was requested, labeled to indicate which exceptions apply to which parts of the information. *See* Gov't Code § 552.301(e).

You state that the department received the written request for information on August 1, 2003. Thus, the department was required to request a decision from our office as to whether any portion of the requested information could be withheld from disclosure on or before August 15, 2003 and submit the items required to be submitted to us pursuant to section 552.301(e) on or before August 22, 2003. However, the department did not request a decision from us regarding the requested information until August 28, 2003 and did not submit the items required to be submitted to us pursuant to section 552.301(e) until September 03, 2003. Accordingly, we conclude that the department failed to comply with the procedural requirements of section 552.301 in requesting this decision from us.

Because the department failed to comply with the procedural requirements of section 552.301 in requesting this decision from us, the information at issue is now presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The department must demonstrate a compelling interest in order to overcome the presumption that the information at issue is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address your arguments concerning this exception.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. You indicate that the submitted information is excepted in its entirety under section 161.0213 of the Health and Safety Code. Section 161.0213 provides as follows:

Reports, records, and information furnished to the commissioner or the commissioner's designee or the Texas Natural Resource Conservation Commission that relate to an epidemiologic or toxicologic investigation of human illnesses or conditions and of environmental exposures that are harmful or believed to be harmful to the public health are not public

information under Chapter 552, Government Code, and are subject to the same confidentiality requirements as described by Section 81.046.

You state that the information was either furnished to the department or gathered or created by the department and that it relates “to an epidemiologic or toxicologic investigation of human illnesses and conditions, or environmental exposures that are harmful or believed to be harmful[.]” See Health & Safety Code § 161.0211 (providing that department shall conduct epidemiologic or toxicologic investigations of illnesses or conditions and of environmental exposures believed to be harmful to public health). Based on these representations and our review of the submitted information, we determine that the department must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 161.0213 of the Health and Safety Code. As our ruling is dispositive, we need not address your argument under section 81.046 of the Health and Safety Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 190400

Enc. Submitted documents

c: Ms. Tracey Conwell
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(w/o enclosures)